

Weekly Summary of Cases National Labor Relations Board

Week of August 9-13, 2010, W-3273

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Summarized Board Decisions

United States Postal Service (10-CA-36056(P) (formerly 16-CA-23973(P)); 355 NLRB No. 72) Dallas, TX, August 9, 2010. [HTML] [PDF]

The Board agreed with the Administrative Law Judge and found that the employer violated the Act by denying an employee's request for union representation during an interview that the employee reasonably believed might result in disciplinary action. The Board also agreed with the judge that the employer further violated the Act when it disciplined that employee in response to her refusal to attend the interview without union representation.

Charge filed by National Postal Professional Nurses. Administrative Law Judge John H. West issued his decision October 20, 2006. Chairman Liebman and Members Becker and Pearce participated.

Legacy Health System, (36-CA-10299; 355 NLRB No. 76) Portland, OR, August 9, 2010. [HTML] [PDF]

The Board adopted the Administrative Law Judge's finding that the Respondent's prohibition against an employee holding dual part-time positions - one job in a unit represented by a union and the other job not represented by a union - constituted a hiring policy that discriminated on the basis of Section 7 considerations and violated 8(a)(3) and (1). In adopting the judge's finding, the Board relied on the "comparatively slight" legal analysis set forth in the Supreme Court's decision in NLRB. Great Dane Trailers, 388 U.S. 26, 33-34 (1967), rather than the Court's "inherently destructive" theory which the judge applied. Chairman Liebman and Member Pearce stated in a footnote that although they found it unnecessary to pass on the "inherently destructive" theory, they would agree with the judge that the dual-employment policy would be unlawful under that theory.

Administrative Law Judge Gerald A. Wacknov issued his decision on February 11, 2009. The original charge was filed by Service Employees International Union, Local 49, on April 30, 2008. Amended and Second Amended charges were filed by the Union on May 5 and July 21, 2008, respectively. Chairman Liebman and Members Schaumber and Pearce participated.

First Student, Inc., (18-RC-17565; 355 NLRB No. 78), Rochester, MN, August 9, 2010. [HTML] [PDF]

The Board found that the employer, a school bus company, engaged in objectionable conduct in an election among its bus drivers by selecting a trainer/substitute driver as its election observer. The Board agreed with the hearing officer that, based on her duties related to the employer's driver training program, other employees could reasonably view the trainer/substitute driver as closely identified with management. The Board adopted the hearing officer's recommendation to set aside the election and schedule a new election. Member Schaumber, dissenting, found that the employee performed only routine duties and that finding her ineligible to serve as an observer inappropriately restricts the employer's choice of observers and the Section 7 rights of employees who wish to be observers. (The employer did not appeal the hearing officer's finding that the trainer/substitute driver was a supervisor under the Act.)

Hearing Officer Deborah K. Rogers issued her report June 2, 2008. The petition was filed February 29, 2008, by Service Employees Local 284 and Amalgamated Transit Union, Local 1005. Chairman Liebman and Members Schaumber and Pearce participated.

California Gas Transport, Inc. (28-CA-19645, et al.; 355 NLRB No. 73)) El Paso, TX, August 10, 2010. [HTML] [PDF]

The Board found that the employer, a transport company, violated the Act by discriminating against its employees for activity protected by the Act. The Board directed that the Respondent make eleven employees whole for any loss of earnings or benefits suffered as a result of the discrimination. The instant order affirms an administrative law judge's findings at the compliance hearing. The Board rejected the employer's argument that two employees failed to mitigate their damages by entering into self-employment; rejected the employer's contention that gross revenue is a better measure of backpay for self-employed discriminatees; and rejected the employer's argument that it was precluded from making an offer of proof regarding the testimony of its expert witness.

Administrative Law Judge John J. McCarrick issued his Supplemental Decision April 23, 2009. Charges were filed by General Teamsters (excluding Mailers), State of Arizona, Local 104, an affiliate of the International Brotherhood of Teamsters. Chairman Liebman, Members Schaumber and Becker participated.

St. John's Community Services – New Jersey and Communications Workers of America, Local 1037, AFL-CIO. (22-CA-26934; 355 NLRB No. 70) Hamilton, N.J., August 10, 2010. [HTML] [PDF]

The Board majority (Chairman Liebman and Member Becker) agreed with the administrative law judge that the Employer violated the Act by: (1) more strictly enforcing its medication administration policy upon its employees, including one individual, in response to their selection of the Union as their bargaining representative; (2) discharging that individual pursuant to the stricter enforcement; and (3) making the change in enforcement without providing the Union notice and an opportunity to bargain. Member Schaumber, dissenting, found that the Employer did not more strictly enforce its medication administration policy and that, even if it did, the

General Counsel failed to establish that the change in enforcement was unlawfully motivated. Administrative Law Judge Steven Davis issued his decision on May 4, 2006. The charges were filed by the Communications Workers of America, Local 1037, AFL-CIO. Chairman Liebman and Members Schaumber and Becker participated.

Decisions in cases involving prior rulings by two-member Board

The following cases involve prior rulings by the two-member Board, whose authority to act was rejected by the U.S. Supreme Court decision in New Process Steel, LP (June 17, 2010). The new decisions summarized here were reached by a three-member panel of the Board or by the full Board.

Fola Coal Company LLC d/b/a Powellton Coal Company (9-CA-44608, 44650; 355 NLRB No. 75) Bickmore, WV, August 9, 2010. [HTML] [PDF]

The Board adopted the Administrative Law Judge's decision and found that the Respondent violated the Act by informing an employee that he was not allowed to pass out union literature on company property and by promulgating an unlawfully broad rule that prohibited employees from engaging in conversations about the Union, from engaging in solicitation, and from engaging in distribution during paid time. The Board also adopted the judge's finding that the Respondent violated the Act by issuing a verbal warning for "union talk on pay time," but found it unnecessary to pass on his additional finding that the verbal warning also violated Section 8(a)(4) because the remedy for that violation would be essentially the same as the remedy for the 8(a)(3) violation.

Administrative Law Judge George Carson II issued his decision April 16, 2009. Charges filed by United Mine Workers of America, AFL-CIO. Chairman Liebman and Members Schaumber and Becker participated.

Spurlino Materials, LLC (25-CA-30053, et al.; 355 NLRB No. 77), Indianapolis, IN, August 9, 2010. [HTML] [PDF]

The Board affirmed the judge's findings that the employer violated the Act by unilaterally assigning unit work to nonunit employees, creating new positions, and instituting a new evaluation system to staff the new positions. The Board also found that the employer violated the Act by failing to select three prominent union supporters for the new positions, by later discharging one of them, and by failing to accord the discharged employee his union representation rights. The Board reversed the judge to find that the employer also violated the Act by discriminating against the same three prominent union supporters by not dispatching them according to the established seniority system. Again reversing the judge, the Board found that the employer did not fail to timely answer the union's information request. Finally, the Board disagreed with the judge's recommendation to extend the Union's certification year.

Administrative Law Judge Ira Sandron issued his decision on December 17, 2007. Charges filed by Coal, Ice, Building Material, Supply Drivers, Riggers, Heavy Haulers, Warehousemen and Helpers, and Local Union 716, a/w International Brotherhood of Teamsters, Chauffeurs,

Warehousemen, and Helpers of America. Chairman Liebman and Members Schaumber and Hayes participated.

Windstream Corp. (6-CA-35290, 355 NLRB No. 74) Meadville, PA, August 9, 2010. [HTML] [PDF]

The Board found that the employer, a provider of voice, data and video telephonic communication services, violated the Act by unilaterally implementing a zero tolerance disciplinary policy for violations of its ethics and integrity rules. The Board also agreed with the Administrative Law Judge that the allegation was not appropriate for deferral to arbitration. (The employer did not appeal the ALJ's order requiring it to post the Board's notice to employees on its intranet with a link sent by e-mail to unit employees.)

Administrative Law Judge Michael A. Marcionese issued his decision April 9, 2007. Charge was filed by the International Brotherhood of Electrical Workers on behalf of its affiliated Local Unions 463, 1189, 1507, 1929, 2089, and 2374. Chairman Liebman and Members Schaumber and Becker participated.

CSS Healthcare Services, Inc. (10-CA-37628; 355 NLRB No. 79) Jonesboro, GA, August 10, 2010. [HTML] [PDF]

The Board adopted the Administrative Law Judge's findings that the Respondent violated the Act by discharging an employee for engaging in protected concerted activities. The decision contains a personal footnote by Member Schaumber stating that while he agrees that the Respondent's stated reason for discharging the employee – i.e., that she failed to timely apply for funding of the Respondent's projects – he would not find the testimony of two state auditors supports a finding of pretext. Rather, Member Schaumber would instead rely on the Respondent's shifting rationale for discharging the employee as evidence of pretext. Chairman Liebman and Member Pearce, while agreeing with the judge's rationale, would also find that the Respondent's shifting justifications supported a finding of pretext.

Administrative Law Judge Michael A. Marcionese issued his decision September 29, 2009. Charge filed by an Individual. Chairman Liebman and Members Schaumber and Pearce participated.

Galicks, Inc. (8-CA-36079, -36766; 355 NLRB No. 68) New Philadelphia, OH, August 6, 2010. [HTML] [PDF]

The Board affirmed the finding of the administrative law judge that the union's charge alleging that Galicks violated Section 8(a)(5) by assigning bargaining-unit work to nonunit employees without affording the Union notice and an opportunity to bargain was filed too late. The Board also affirmed, but for different reasons, the judge's findings that Galicks violated Section 8(a)(5) by refusing to furnish the Union information it requested in August 2005 and August 2006, and by withdrawing recognition from the Union in September 2006. Finally, the Board reversed the

judge's decision and found that Galicks violated Section 8(a)(3) by failing to recall journeymen from layoff because the journeymen were represented by the Union.

Administrative Law Judge Ira Sandron issued his decision June 20, 2007. Charges were filed by Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO. Chairman Liebman and Members Schaumber and Pearce participated.

County Waste of Ulster, LLC (2-CA-37437, 2-RC-22858; 355 NLRB No. 64) Montgomery and Kingston, NY, August 10, 2010. [HTML] [PDF]

The Board adopted the administrative law judge's findings that the Respondent (a) violated the Act by allowing Local 124, R.A.I.S.E., IUJAT, to distribute a Christmas bonus to its employees and (b) engaged in objectionable conduct by granting the bonus. The Board severed and remanded the grant of bonus violation to the judge to clarify whether he intended to find the unalleged violation and, if so, to apply *Pergament United Sales*, 296 NLRB 333 (1989). A second election was directed.

Administrative Law Judge Raymond P. Green issued his decision May 9, 2007. Charges filed by the Laborers International Union of North America, Local 108. Chairman Liebman and Members Schaumber and Pearce participated.

Local 1075, Laborers' International Union of North America (7-CC-1831, 1832; 355 NLRB No. 80) Marysville, MI, August 10, 2010. [HTML] [PDF]

The Board affirmed the Administrative Law Judge's finding that the Respondents violated the Act by picketing at a "common situs" involving both neutral and primary employers, without properly identifying the primary employers and by continuing to picket at the neutral gate after a valid dual-gate system was established.

Administrative Law Judge Ira Sandron issued his decision October 29, 2009. Charges were filed by McCarthy & Smith, Inc. Chairman Liebman and Members Schaumber and Pearce participated.

Sheehy Enterprizes, Inc. (25-CA-30583, 355 NLRB No. 83), Indianapolis, IN, Aug. 12, 2010. [HTML] [PDF]

The Board found that the employer violated the Act by refusing to adhere to, and repudiating, the collective-bargaining agreement to which it agreed to be bound on May 21, 2004. In finding the violation, the Board rejected the employer's contention that the contract is void or should be rescinded because of fraud or mutual mistake. The employer had claimed that he believed, based on an alleged misrepresentation by the union, that the agreement bound him only for a single project. The Board found that no fraud had been established, and that the employer's alleged mistake in signing the agreement did not warrant rescission because the employer had the opportunity to read the documents but did not do so.

Administrative Law Judge Joel P. Biblowitz issued his decision on September 3, 2008. Charge was filed by Laborers' International Union of North America, State of Indiana District Council, a/w Laborers' International Union of North America. Chairman Liebman and Members Schaumber and Becker participated.

Unpublished Board Decisions in Representation Cases

Ben Hur Steel Worx (14-RC-12795) St. Louis, MO, August 9, 2010. Board Order denying Employer's special permission to appeal the Regional Director's refusal to postpone the hearing on objections and stay the hearing. Petitioner – Iron Worker Shopmen's Union, Local 518

Hotel Wailea (37-RC-4217) Wailea, Maui, HI, August 10, 2010. No exceptions having been filed to the Acting Regional Director's report recommending disposition of objections for an election held June 15, 2010, the Board adopted the Acting Regional Director's findings and recommendations, and ordered that the proceeding be remanded to the Regional Director for further appropriate action. Petitioner – International Longshore & Warehouse Union, Local 142, AFL-CIO

American Bottling Company (22-RC-13110) Avenel, NJ, August 10, 2010. No exceptions having been filed to the Regional Director's report recommending disposition of objections for an election held June 18, 2010, the Board adopted the Regional Director's findings and recommendations, and found that a certification of results of election should be issued. Petitioner – International Brotherhood of Teamsters, Local 125.

Sheraton Station Square Hotel (6-RM-733) Pittsburg, PA, August 12, 2010. Order granting Employer's motion to file request for review beyond the time prescribed in the rules / opposition to the request for review due August 19, 2010. Petitioner – Sheraton Station Square Hotel.

Volunteers of America Greater New York, Inc. (2-RC-23489 et al.) Rochelle, NY, August 12, 2010. Order denying Employer's request for review of the Regional Director's decision and direction of election. Employer's request to postpone the election is therefore moot. Petitioner – Community and Social Agency Employees Unions, District Counsel 1707, AFSCME, AFL-CIO. Chairman Liebman and Members Pearce and Hayes participated.

Decisions of Administrative Law Judges

Danite Holdings, LTD d/b/a Danite Sign Company (9-CA-45500, et al.; JD-46-10) Columbus, OH. Charges filed by Sheet Metal Workers International Association Local 24, International Brotherhood of Electrical Workers, Local 683. Administrative Law Judge Arthur J Amchan issued his decision August 9, 2010. [HTML] [PDF]

UNITE HERE! (2-CA-39534; JD(NY)-32-10) New York, NY. Charge filed by Federation of Union Representatives. Administrative Law Judge Raymond P. Green issued his decision August 10, 2010. [HTML] [PDF]

Graham's Trucking and Excavating, Inc. (13-CA-45536, 45590; JD-43-10) Cedar Lake, IN. Charges filed by International Union of Operating Engineers, Local 150, AFL-CIO. Administrative Law Judge Mark D. Rubin issued his decision August 10, 2010. [HTML] [PDF]

Costco Wholesale Corporation (34-CA-12421; JD(NY)-30-10) Milford, CT. Charge filed by United Food and Commercial Workers Union, Local 371. Administrative Law Judge Steven Fish issued his decision August 11, 2010. [HTML] [PDF]
